UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

MHA, LLC d/b/a MEADOWLANDS HOSPITAL MEDICAL CENTER, Respondent, -and- HEALTH PROFESSIONAL AND ALLIED EMPLOYEES, AFT/AFL-CIO, Union.	Case Nos. 22-CA-086823 22-CA-089716 22-CA-090437 22-CA-091025 22-CA-091521 22-CA-092061 22-CA-096650 22-CA-097214 22-CA-099492 22-CA-100324 22-CA-106694

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO GENERAL COUNSEL'S ANSWERING BRIEF AND IN FURTHER SUPPORT OF ITS EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

I. INTRODUCTION.

Respondent MHA, LLC d/b/a Meadowlands Hospital Medical Center ("Respondent") submits this Reply Brief in opposition to General Counsel's Answering Brief and in support of its Exceptions to the September 20, 2016 Decision and Recommended Order of Administrative Law Judge Steven Davis ("ALJ").

II. ARGUMENT.

Consistent with its Motion to Strike, Respondent maintains that General Counsel's Answering Brief is rife with factual averments for which he cites no reference to the record[1]. General Counsel's brief in many portions is so unsupported as to be tantamount to a deliberate attempt to mislead the Board. For example, General Counsel, **in his Summary of Argument**, states: "For example, almost immediately after the purchase of the hospital, Respondent **improperly classified all employees as probationary** (with a hire date of December 7, 2010) and **discharged 20 of those employees without just cause.**" (GCB p.3). General Counsel's statement is patently false. The Union **claimed** that Respondent improperly classified employees as probationary and **claimed** Respondent discharged 20 employees without just cause. However, the dispute proceeded to arbitration and Respondent prevailed with the **arbitrator upholding the both the classification and the discharges.** (GCX 14). General Counsel's misstatement colors the Respondent in a false light and is so misleading that it is difficult to conclude that the statement was inadvertent.

A. Respondents Elimination Of The 12-Hour Shifts.

The Board's decisions in Kerry, Inc., 358 NLRB 980 (2012) and United Technologies Corp., 300 NLRB 902 (1990) are on point and mandate a finding of waiver. (GCB pp. 13-17). General Counsel's attempt to distinguish Kerry, Inc. as lacking any "qualifying language" is

[1] Concomitant with this Reply, Respondent has filed a Motion to Strike Portions of General Counsel's Answering Brief in Opposition to Respondent's Exceptions.

incorrect. In Kerry the Board affirmed that the employer's change in the work schedule of three 8-hour shifts to a daily schedule of two 12-hour shifts midway through the contract was lawful under the parties' management rights provision. Id. at 992. As in Kerry, Inc. and United Technologies Corp., 300 NLRB 902 (1990), the parties' Management Rights clause authorized Respondent's elimination of the 12-hour shifts.

B. The November 2011 MOU Addressed The Union's Access Rights.

Contrary to General Counsel's argument, Subsection 4.4, of the CBA titled "Union Visitation," does not provide for Union visitation in the cafeteria. (GCX6 p.7 §4.4). General Counsel also asserts that the parties' negotiated November 2011 MOU did not address the Union's access rights, but rather, solely dealt with Dudsak's discipline, Torrey's criminal trespass complaint, and other lingering problems. (GCB p. 30; GCX101). However, the express language of the November 2011 MOU provided, "***MHA agrees to provide HPAE a meeting room as designated by MHA*** every other week subject to the following terms and conditions . . . ." (GCX101) (emphasis added). Consistent with this language, Torrey testified that on October 27, 2011, he met with a Hospital representative to discuss various grievances, as well as "areas where employee Union representatives could meet with employees and the length of time of such meetings." (D. 107:39-43). Yet, General Counsel avers that Respondent's point-person, Tomas Gregorio, testified that "the parties did not discuss contractual access provisions." (GCB, p. 31) and omits any citation to this supposed testimony because Gregorio testified that the parties were "trying to put boundaries around where [the Union and its members] could meet with their employees." (Tr. 2203:20-2204:7).

C. The Union Engaged In "Economic Pressure Activity."

General Counsel posits several arguments in favor of the ALJ's findings and conclusions, none of which are meritorious.[2]

General Counsel asserts that the No-Strike Clause is not a "clear and unmistakable" waiver of the right to engage in a corporate campaign against Respondent. (GC A. Br., p. 83). General Counsel notes that Respondent neglected to file suit or seek an injunction against the Union. (GCB p. 82). However, General Counsel fails to point to any contract language or case law mandating that the Hospital take such action as a prerequisite. Nor is there any basis for applying an adverse inference with respect to Respondent's refusal to call its legal counsel at trial. (GCB, pp. 83-84).

General Counsel asserts that the language "other economic pressure activities" was intended to be limited to job actions that occur on or at the Hospital's workplace. (GCB p. 84). This narrow interpretation is not supported by the record evidence or Board law. Ann Twomey, Union President provided no geographic limits and correctly, "defined economic pressure, as it relates to the parties' contract, as such activity which is meant to have some direct impact on the Respondent's economy." (D. 124:37-40). Further, the Board's decisions General Counsel cited, Mental Health Services, 300 NLRB 926 (1990), (GCB., p. 84), and Engelhard Corp., 342 NLRB

[2] General Counsel argues that the ALJ did not commit reversible error by refusing to issue and revoking subpoenas to third-party witnesses. (GC A. Br., p. 87 n. 31). Contrary to General Counsel's blanket assertion, the information subpoenaed by Respondent was both relevant and critical to Respondent's Affirmative Defense. In particular, Respondent identified an October 18, 2012 e-mail from Wardell Sanders listing the subpoenaed parties and the Union's agents as recipients, confirming that the parties met to discuss the Union's labor disputes with Respondent. (Tr. 3189-90; Tr. 3203-04; Tr. 3406-09; R121, R126, and R127). At the hearing, the Union's witnesses provided vague and incomplete testimony when questioned as to the events outlined in Sanders' October 18, 2012 e-mail. (Tr. 3189-90, 3203-3211:2; 3217:17-321; R121, R126, and R127). In fact, Judge Davis expressly held that the subpoenas sought evidence that was both relevant and "critical" to Respondent's affirmative defense, not in Charging Party's possession and "not obtainable from another source." (March 11, 2016 Order, at p. 8). Notwithstanding, the ALJ revoked the subpoenas without even an *in camera* review. See Ozark Auto. Distribs., Inc., 779 F.3d 576, 581-82 (D.C. Cir. 2015) (reversing Hearing Officer based on failure to conduct *in camera* review prior to revoking subpoenas, noting that "she did not know what the documents would have shown . . . . [y]et the company's need for the documents necessarily depended on what the documents would have tended to prove"). The ALJ's evidentiary rulings, denying Respondent the opportunity to examine Knowlton, Smith, and the other third-parties, resulted in a deprivation of Due Process and, therefore, constitutes reversible error. See Ozark Auto. Distribs., Inc., 779 F.3d at 585-86 (vacating the Board's Order as the Hearing Officer's revocation of the subpoenas was prejudicial to the employer's ability to establish its defense, as well as obtain truthful information from witnesses upon cross-examination).

46, 48 (2004) (GCB p. 85) are distinguishable. In Engelhard Corp., the management-rights provision expressly stated the parties' intent – to refrain from various job actions "to prevent any suspension of work due to labor disputes." In Mental Health Services, the Board found the employer's insistence on a broad management rights provision to impasse unlawful because the contract proposal was a non-mandatory subject of bargaining. The Board did not posit as to the union's ability to relinquish its right to petition government offices. Id. at 926. Here, the parties' No-Strike Clause does not provide any limiting or explanatory language.

i. The Union' Communications With Media Outlets Was In Breach.

Incredibly, General Counsel avers that "[t]he record is unclear if the Union contacted newspaper reporters . . . ." (GCB, p. 87). The record is replete with testimony and evidence to the contrary. (Tr. 2889-90; 2892; 2971-72; 3044-45; 3227-28; 3250-51; 3307; 3441; GC89; R82; R134-R160).

ii. Respondent Properly Suspended Bargaining.

General Counsel avers that Respondent was not privileged to suspend bargaining as it was not narrowly tailored to remedy the Union's "economic pressure activity" (GCB, pp. 91-92) is contrary to the Board's decision in Arundel Corp., 210 NLRB 525, 527 (1974). The Board did not hold that Arundel was privileged to suspend bargaining only as to certain provisions related to the union's strike.

D. The Veritas Information Request

The ALJ's ruling that Levine had a reasonable objective factual basis for believing an alter ego relationship may exist between Respondent and Veritas is premised on Certificate of Formation. (GC56). General Counsel speculates that the document originated from "the New Jersey Department of the Treasury" and simply reiterates the ALJ's baseless conclusion that the document is "an official document filed with the State." ((GCB. p. 10;D. 17:41-43). General Counsel's reliance on H&R Industr. Svs, Inc., 351 NLRB 1222 (2007) is misplaced. The Union's

belief of an alter ego relationship in that case was based in part on information the Union obtained from "searching the Pennsylvania corporate records" internet site. Id. at 1223.[3] Here, there is no evidence as to where the document originated. The Union cannot meet its burden here by relying primarily on an unauthenticated "certificate." See Lily Transp. Corp. 363 NLRB No. 15, fn.3 (2015).

E. Substantially Comparable Medical Plans

Respondent maintains that the benefit levels offered in each plan were substantially comparable. General Counsel misrepresents that Respondent argues any changes were de minimis. (GCABr. p.56). General Counsel misrepresents Respondent's expert report. DiBella did not "estimate that Respondent's 2012 PPO plan paid 91% of the cost of care while the 3013 PPO paid only 80% of the cost." (Id. p.57). DiBella estimated the actuarial value of the plans, (R74; Tr. 2690:24 – 2691:6), not the "cost of care"-- a concept not defined anywhere in the record. For example, the 2010 PPO and the 2012 PPO had **identical** actuarial values of 91%. (R74 p.5). Also, DiBella did not "estimate that the 2014 plan would pay for 97% of employees' out-of-pocket expenses." (GCABr. p.58). He estimated that the 2014 plan had an actuarial value of 97%, 6% **higher** than the 2010 plan. (R74 p.5). General Counsel incorrectly claims that "DiBella failed to testify that Respondent's plans . . . were comparable to similarly situated medical benefit plans." (GCABr. p.58). DiBella specifically testified that the plans were substantially comparable. See Tr. 2713:21-25). Carrier-Journal, 342 NLRB 1093 (2004) is neither analogous nor instructive. The contract language in that case is inconsistent with the language here. The past practice relied on by the Board in Carrier-Journal is not a factor here. Respondent does not cite to or rely on that case in support of its exceptions. Heartland Human

[3] General Counsel's citation to M. Scher & Son, 286 NLRB 688, at 691 fn.1 (1987), (GCB p. 11), is also unhelpful as the only footnote on page 691 is 5, not 1; the footnote deals with Board Rules and Regulations not relevant here; and footnote 1 addresses the year referenced through the decision.

Svcs., 360 NLRB No. 47 (2014) is also inapposite in Heartland the Employer admitted to changing its medical benefits, but that doing so was lawful as it had previously withdrawn recognition. Id. at

F. DNV Inspection Report

General Counsel states that the ALJ correctly found the DNV Inspection Report to be presumptively relevant based upon McVey's vague email, (GCX 72), that the report would become a "playbook" (GB 7). General Counsel bootstraps this conclusion by stating, without citation or support, that McVey's statement "clearly indicates that Respondent intended to implement changes using the same evidence-based management practices utilized by the hospital in the past for similar changes." (GCB p. 7). Therefore, ALJ has not established presumptive relevance.

General Counsel also incorrectly raises the bar and states that it is the Respondent's burden to establish the "only" purpose of the Union's request for the report was a bad faith purpose. (GB p.8.) General Counsel erroneously cites to Detroit Edison Co. v. NLRB, 440 U.S. 301, 318 (1979) while confusing the burden for bad faith with the burden for establishing confidentiality.

G. Dunaev Threat

General Counsel argues that Dunaev's testimony concerning the alleged threat was vague and lacked credibility. (GB p. 77). General Counsel, without any citation to the record, states that Dunaev "feigned ignorance" about the press conference and Dr. Lipsky's testimony about complaining about a defamatory document supports his characterization of Dunaev's testimony. (GB p. 77). General Counsel unsupported statements are a blatant attempt to mislead the Board. Dunaev's statement about the Union's planned media attack on the hospital and its possible negative impact on the Rehab unit was a reasonable prediction of a possible outcome. Dunaev testified without contradictions that the rehab unit had 5 patients and 20 employees. (GCB p. 75).

General Counsel, however, ludicrously stated that there is no link between patient census and the need to a rehabilitation unit. (GCB p. 76). Thus, contrary to General Counsel's conclusion Respondent met its burden to establish Dunaev's statements as legally proper prediction. Finally, General Counsel points to the actual closing of the unit as evidence supporting the ALJ's finding. (GCB p. 76 fn 24). Ironically, the closing supports Dunaev's lawful statement. Conspicuously absent from the record or the complaint is an allegation that Respondent unlawfully closed the unit.

H. The Assignment of Service Work to Per Diem Employees

General Counsel states: "Respondent has admitted to the unlawful conduct here." (GCB p. 28) Respondent made no such admission. General Counsel attempts to buttress this argument by stating, again without any reference to the record, that respondent witness Garrity admitted that full-time and part-time employees were "more costly." (GB p. 38). Respondent avers that the contract permits the hiring of per diems and excludes them form the unit. (GCX 7a. p. 15) Significantly, GCX 149, 150, and 156 establish that Respondent conducted layoffs of full-time and part-time service workers. However, there is not one allegation or any record evidence that the Union contested the necessity of the layoffs. Further, neither the ALJ nor General Counsel can point to a single contractual provisions, past practice or testimony to establish that there was any limits or prohibitions concerning the assignment of work to service worker per diems. The entire conclusion that Respondent acted unlawfully in this regard has absolutely no basis in the record.

I. Seguinot's Bumping Rights

General Counsel again misstates the record and Respondent's argument. General Counsel states there is no dispute that Juan Seguinot had the contractual right to bump based upon his prior experience, (GCB p. 41); which is precisely the dispute that the trial engaged. Seguinot was not qualified to bump Ahmad Abdelquader. Despite General Counsel's assertion that Respondent produced no evidence about Abdelquader's training, Afif Escheik's forthright testimony and

Respondent's exhibits belie General Counsel's assertion. (Tr. 1945-49; R27-R-29). General Counsel attempts to discredit Escheik's testimony by stating Escheik "feigned ignorance about the date of the installation of the PMM sytem" (the system on which Abdelquader was trained). (GCB p. 41). However, it is General Counsel who must be discredited as the record establishes that the PMM system and the policy and procedures were installed prior to Escheik arriving at the hospital. (Tr. 1955). Thus, there is no basis to discredit Eschiek's testimony or Respondent's conclusion that Seguinot was not qualified to bump Abdelquader.

J. RN Interns

General Counsel's argument concerning the admissibility of the U.S. Department of Labor's settlement agreement and narrative report is nonsensical. First, General Counsel argues that the documents are admissible because he proffered them to prove "that RN interns had filed a claim over their employment status, which led to a settlement of those allegations." (GCB pp. 69, 71). General Counsel also attempts to dodge the hearsay nature of the narrative report by stating "that it was not introduced for the truth, but rather only the narrative report to confirm that Respondent entered into a settlement to resolve the wage claims. (GCB p. 71). **General Counsel's representations to the Board in his opposition brief is astounding and completely contrary to the representations he made to the ALJ at trial when he argued that the documents were offered to rebut the testimony of Felicia Karsos, Elizabeth Garrity and other Respondent witnesses.** (Tr. 3572:10-25).

Second, General Counsel attempts to distinguish from the purview of Federal Rule of Evidence 408 by asserting that wrongful acts committed during compromise negotiations are not shielded because they took place during compromise negotiations. (GCB p. 70). General Counsel's argument completely misses the mark as there is no allegation that Respondent committed any wrongdoing during the course of negotiations.

Finally, general Counsel's argument that the ALJ permissibly considered the settlement agreement and investigative narrative to determine that the RNs were paid at one time and then became unpaid does not cure the error. (GCB p. 71 fn. 22). There was no dispute that the RN interns were at first paid and then unpaid. Respondent's witnesses testified to the fact. (Tr. 338, 257, 788, 1422). Further, the conclusory narrative (GCX223) does not address the pay issue but rather is a series of conclusions drawn by an investigator not present to testify. (Tr. 3571:10-13).

Finally, General Counsel, as set forth in Respondent's motion to strike, General Counsel references three pages of supposed facts in the record without a single citation or document reference. (GCB pp. 72-75). As such the Board should consider Respondent's arguments concerning the RN intern findings as unrebutted by General Counsel.

K. Refusal to Bargain Over Layoff Criteria

General Counsel uses colorful language in an effort to debunk Respondent's arguments concerning the ALJ's erroneous reliance on Tesoro Refining and Marketing, 360 NLRB 293 (2014). General Counsel accuses Respondent of "chiding" the ALJ by distinguishing Tesoro. (GCB p. 24). While General Counsel expressed that Tesoro exposed "the lie behind Respondent's masquerade" (GCB p. 24), General Counsel fails to identify what constitutes the lie and the masquerade. General Counsel fails to address how, Tesoro, a case about a failure to bargain in good faith over the effects of a change where there was no dispute over whether bargain was necessary counters Respondent's argument that the contract extinguished any further duty to bargain over the layoffs.

L. The Determination of Whether RNs Were "Fully Qualified'

General Counsel opposes Respondent's assertion that the ALJ substituted his judgment for the unrebutted testimony of Respondent's Chief Nursing Officer Felicia Karsos. General Counsel sets out almost an entire page of assertions (including a 15 line footnote) without a single citation

to the record. (GCB p. 49). As such, the Board should consider Respondent's arguments in regard to the RN bumping issue to be unopposed.

Further, General Counsel asserts that the ALJ correctly overruled Karsos's determinations that the RNs at issue were not "fully qualified" to bump the less senior nurses based on the mere fact that RNs may have floated to other areas during their tenure with Respondent. Without citing to the record, General Counsel asserts that Karsos testified in a cursory perfunctory manner which was undermined by Human resource Director Elizabeth Garrity. General Counsel's assertion is specious. Karsos's perfunctory testimony concerning bumping and recall consumed approximately 120 pages of transcript. (Tr. 2248-2368). Also, General Counsel fails to cite to the record or adequately explain how Garrity's testimony "undermines" Karsos's testimony or conclusions.

General Counsel's cursory perfunctory argument does nothing to dispel the conclusion that the ALJ, without any valid basis in the record, discounted Karsos's testimony and erroneously substituted his medical judgment for a bona fide medical executive's.

III. CONCLUSION.

For all the foregoing reasons, the Board should sustain Respondent's Exceptions, reverse the ALJ's findings and conclusions of law, and dismiss the Complaint in its entirety.

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Dated: February 24, 2017

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CERTIFICATE OF SERVICE

The undersigned affirms that on February 24, 2017, Respondent's Reply Brief in Further Support of its Exceptions to Administrative Law Judge Steven Davis' Decision was filed with the National Labor Relations Board using the e-filing system at www.nlrb.gov, and that copies were served on the following individuals by electronic mail:

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